

DIVISION I

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ANDREE LAYTON ROAF, Judge

CACR05-658

September 20, 2006

EDWARD HICKS

APPELLANT

v.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM NEVADA COUNTY
CIRCUIT COURT
[NO. CR-2003-66-2]

HONORABLE DUNCAN CULPEPPER,
CIRCUIT JUDGE

AFFIRMED

Appellant Edward Hicks stands charged with committing rape in 2002. In October 2004, he had a trial on this charge, and it ended with the declaration of a mistrial after the jury was unable to render a verdict. Before Hicks's second trial on the rape charge was to be held, he moved for dismissal, based upon *res judicata* and double jeopardy. The trial court denied his motion, and Hicks now pursues an interlocutory appeal of that denial on double-jeopardy grounds. We affirm.

Hicks's trial was held in October 2004. During this trial, the State's witness, Melissa Dickerson, referred to the scheduling of a voice stress analyzer (lie detector) test during her testimony on cross-examination. Specifically, she stated that Hicks's counsel "wanted to set up a voice analyzer test for his client." Hicks moved for a mistrial based on the reference to the voice stress analyzer test, and the trial court denied the motion. The trial, however, ended with the trial court declaring a mistrial because of a hung jury.

Hicks's second trial for the rape charge was set to begin on January 31, 2005. Before the second trial was to begin, Hicks moved for a dismissal of the charge. Hicks argued that the charge should be dismissed based on the theories of *res judicata* and double jeopardy. The trial court denied this motion. Hicks now pursues an interlocutory appeal of that denial, arguing that double jeopardy bars a second trial on the rape charge. It should be noted that an order denying a motion to dismiss based upon double-jeopardy considerations is an appealable order. *Winkle v. State*, ___ Ark. ___, ___ S.W.3d ___ (May 11, 2006). When reviewing a denial of a motion to dismiss based upon double-jeopardy grounds, typically a question of law, the appellate court conducts a *de novo* review. *Id.*

The State asserts that Hicks's double jeopardy argument is not preserved for appellate review, because he has changed his argument on appeal. When Hicks moved for dismissal at the trial court level, he argued the following:

[U]nder the theory of *res judicata*[,] ... this matter has already previously been tried by a jury and there was not finding of guilt against my client. And, also, based upon double jeopardy. A jury was impaneled. They were sworn in. They heard the evidence and testimony. And whenever this [c]ourt dismissed the jury, they had an opportunity to make a specific finding, which they did not. And based upon the fact that they did not make a finding of guilt ... or innocence, and coupled with the fact that the [p]rosecution has no additional information or evidence which to disclose, such as newly discovered evidence or anything of that nature, there's not a likelihood that there would be a conviction at this time. So, therefore, Judge, based upon double jeopardy, as well as *res judicata*, I would request this [c]ourt to grant a [d]irected [v]erdict in the favor the [d]efendant, or in the alternative, to dismiss with prejudice the charges which are continuing against him in this case, based upon the prior jury trial.

Although Hicks based his motion for dismissal as well as his present argument on appeal upon double-jeopardy grounds, he changes the specific double-jeopardy theory behind his argument. On appeal, Hicks argues that a second trial is barred by double jeopardy, because the trial court erred in denying his motion for mistrial during the trial. Hicks asserts that a mistrial was warranted when

a witness for the State testified about the setting up of a voice stress analyzer test. However, Hicks argued to the trial court that retrial was barred, because the jury had failed to find him guilty in the first trial. The argument Hicks makes on appeal as to why a second trial is jeopardy-barred differs from the argument he made below. Even as to constitutional claims, a party is bound on appeal by the scope and nature of the arguments and objections made at trial; a party cannot change the grounds of an objection on appeal. *Holland v. State*, 71 Ark. App. 84, 27 S.W.3d 753 (2000). Here, Hicks failed to bring before the trial court the argument that a second trial is jeopardy-barred based upon the fact that the trial court should have granted his motion for mistrial. Nevertheless, even if this argument were preserved for this court's review, it is without merit.

Hicks asserts that, because the State's witness prejudiced the jury and the trial court refused to grant his motion for mistrial, jeopardy attached during the first trial so that Hicks cannot be tried again for the same crime. However, even if Hicks's motion had been granted, his argument is still without merit. The United States Supreme Court has held that a second trial is not jeopardy-barred after a first trial ends in a mistrial granted on the defendant's motion, "absent any intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Oregon v. Kennedy*, 456 U.S. 667 (1982); *Atchley v. State*, 68 Ark. App. 16, 2 S.W.3d 86 (1999). A defendant whose mistrial motion was granted "may invoke the bar of double jeopardy in a second effort to try him only in cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Kennedy, supra*. "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Id.*

Here, Hicks's motion for mistrial was not even granted. Instead, his trial ended in a mistrial because of a hung jury. Even if Hicks's motion for mistrial had been granted, the State did not try to provoke Hicks into moving for a mistrial. The State's witness made the comment when being questioned by Hicks's attorney. In sum, Hicks's second trial will not violate the Double Jeopardy Clause, and the trial court properly denied his motion to dismiss.

Affirmed.

BIRD and BAKER, JJ., agree.